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No. 85-1215

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEGGY GATES

Petitioner,

versus

SAM SPINKS, HARRY McARTHUR,
ANDREW WILSON, CHARLES PHILLIPS,
JUG ALLEN and PAUL McMULLAN

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MORAN M. POPE, III
Counsel of Record
MORAN M. POPE, JR.
POPE & POPE
Post Office Box 1463
Hattiesburg, MS 39401
(601) 544-2491

Counsel for Respondents

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STATEMENT OF THE CASE

On April 3, 1981, the Petitioner, a contract teacher for the Hattiesburg Municipal Separate School District [hereinafter referred to as School District], was given notice that her principal had not recommended her for reemployment for the 1981-82 school year. Her employment with the School District ended on May 29, 1981. In accordance with the Mississippi Employment Procedures Act (*Miss. Code Ann.* §37-9-101, et seq. (Supp. 1980)), the Petitioner requested a hearing and the School District, through its Board of Trustees, after the hearing, on September 3, 1981, approved, upheld and affirmed the initial administrative recommendation not to reemploy the Petitioner.

The Forrest County Chancery Court reversed the decision of the Board of Trustees, but on December 12, 1984, the Mississippi Supreme Court reversed the decision of the Forrest County Chancery Court and rendered a decision in favor of the Board of Trustees, reinstating its September 3, 1981, decision not to reemploy the Petitioner.

On December 1, 1982, some 20 months after the initial notification of non-renewal of her contract, and 15 months after the Board of Trustees' decision upholding the administrative decision not to renew, the Petitioner filed this 42 U.S.C. §1983 action in the United States District Court for the Southern District of Mississippi against the Board of Trustees and the School District's superintendent. Her suit alleged that her contract was not renewed as a result of a violation of her constitutional rights by the defendants.

The Respondents filed a Motion for Summary Judgment on the ground that the case was barred by *Miss. Code Ann.* §15-1-29 (Supp. 1985), a one-year statute of limitations governing, among other things, contracts of employment. The Petitioner filed a response but no supporting affidavits, and the district court granted the respondents' motion.

The Petitioner then appealed the United States Court of Appeals for the Fifth Circuit. After oral argument, but before the Court of Appeals had rendered an opinion, this Court issued its decision in *Wilson v. Garcia*, 85 L.Ed.2d 254 (1985). The Fifth Circuit requested supplemental briefs from the parties regarding which of *two* Mississippi limitation periods for personal injury should apply in light of *Wilson*.

On September 26, 1985, the Court of Appeals affirmed the District Court's decision holding that *Miss. Code Ann.* §15-1-35 (Supp. 1985) was the governing statute of limitations for all §1983 claims in Mississippi. *Gates v. Spinks*, 717 F.2d 916 (5th Cir. 1985).

The Petitioner's Request for Rehearing and Rehearing *En Banc* were denied by the Fifth Circuit on October 22, 1985.

SUMMARY OF THE ARGUMENT

In *Wilson v. Garcia*, 85 L.Ed.2d 254 (1985), this Court did not address the question of *which* personal injury statute would apply in § 1983 cases when a state has two (or more) statutes that deal with personal injuries.

The *Wilson* decision did, however, give strong enough guidance for the Fifth, Sixth and Eleventh Circuit Courts of Appeal to choose a statute dealing with *intentional* torts over a statute governing *negligence-based* or *strict liability-based* torts. Using the Court's reasoning in *Wilson*, the Sixth Circuit in *Mulligan v. Hazard*, No. 84-3555, slip op. (6th Cir. Nov. 26, 1985) adopted Ohio's one-year statute of limitations dealing with most intentional torts instead of a two-Year "catch-all" statute. The Eleventh Circuit used the same reasoning, citing the Civil Rights Acts' "historical context" in applying the Alabama six-year statute governing intentional torts rather than a one-year residual statute. *Jones v. Preuit and Mauldin*, 736 F.2d 1250 (11th Cir. 1985). To the Respondents' knowledge, no other Courts of Appeal have addressed the issue other than these two courts and the Fifth Circuit in the case at bar.

Although this in *Wilson* and the Courts of Appeal in *Jones*, *Mulligan* and the case at bar did not discuss the issue of retroactivity, each Court applied the rule in *Wilson* retroactively. Even if, however, the *Wilson* ruling were not to be applied retroactively to the case at bar, the outcome would be the same in light of the District Court's ruling in this case. *See* Petitioner's Appendix, at A-2.

There is not "confusion and conflict" in the application of *Wilson* by the lower courts as the Petitioner asserts. Only two cases decided since *Wilson* rejecting the *Jones-Mulligan-Gates* reasoning were cited by the Petitioner in her brief, both district court decisions. One of these, *Hobson v. Wilson*, No. 76-1326 (D.C. D.C. Dec. 16, 1985), was a 42 U.S.C. §1985(3) case, and that court specifically distinguished its ruling from the decisions in *Jones*, *Mulligan* and *Gates*.

Miss. Code Ann. §15-1-35 (Supp. 1985) is the applicable statute of limitations to the case at bar and all §1983 claims in Mississippi because it "more specifically encompasses the sorts of actions which concerned Congress as it enacted the civil rights statutes." *Mulligan v. Hazard*, slip op. at 8.

I. THE COURT OF APPEALS DID NOT ERR IN ITS APPLICATION OF *WILSON V. GARCIA* IN CONCLUDING THAT ALL 42 U.S.C. §1983 ACTIONS IN MISSISSIPPI ARE GOVERNED BY THAT STATE'S ONE-YEAR LIMITATION FOR INTENTIONAL TORTS.

This Court in *Wilson v. Garcia* recognized that "conflict, confusion and uncertainty" existed "concerning the appropriate statute of limitations" applicable to 42 U.S.C. §1983 [hereinafter referred to as §1983] actions. 85 L.Ed.2d at 260. In an attempt to bring uniformity and certainty to this area, the Court concluded that §1983 claims are best characterized as "personal injury actions" for purposes of applying the particular statute of limitations in each state. 85 L.Ed.2d at 269. In reaching this conclusion, the Court looked to the "specific historical context" for the Reconstruction Civil Rights Acts, and found that "The atrocities that concerned Congress in 1871 plainly sounded in tort." 85 L.Ed.2d at 266-67.

In deciding *Wilson*, the Court was faced with three New Mexico statutes of limitations: a two-year statute contained in the New Mexico Tort Claims Act, a three-year statute for actions "for an injury to the person or reputation of any person" and a four-year "catch-all" statute. 85 L.Ed.2d at 258. The Court chose the three-year statute reasoning that "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injuries than, for example, to claims for damages to property or breach of contract". 85 L.Ed.2d at 267.

The Court in *Wilson*, of course, was not faced with the choice between *two* personal injury statutes as is the case in the instant action. The Court in *Wilson* could have gone

on to further define what it meant by "personal injuries" in states such as Mississippi and others which have two or more statutes dealing with personal injuries.[1] Indeed, this was one of the criticisms of Justice O'Connor in her dissent to the *Wilson* decision.[2] The Court, however, chose to go no further than to hold only that in each state the statute of limitations for §1983 actions originating in that state must be one that governs "a general remedy for injuries to personal rights." 85 L.Ed.2d at 268.

While the Court did not directly address the question of which statute would be applied when the choice was between a statute governing intentional torts and one governing other kinds of torts, the reasoning it used in reaching its decision in *Wilson* was enough to convince the Eleventh, Sixth and Fifth Circuit Courts of Appeal that, when faced with that choice, a statute governing intentional torts was more analogous to §1983 actions than a statute dealing with negligence and strict liability.

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1. The following states have one-year statutes of limitations which govern certain intentional torts: Arizona (*Ariz. Rev. Stat.* §12-541); Arkansas (*Ark. Stat. Ann.* §37.201); California (*Cal. Civ. Proc.* §340-2); Colorado (*Colo. Rev. Stat.* §13-80-102); Kansas (*Kan. Stat.* §60-514); Maryland (*Md. Cts. & Jud. Proc. Code Ann.* §5-105); Mississippi (*Miss. Code Ann.* §15-1-35); Nebraska (*Neb. Rev. Stat.* §25-208); North Carolina (*N.C. Gen. Stat.* §1-54); Ohio (*Ohio Rev. Code Ann.* §2305.11); Oklahoma (*Okla. Stat. Ann.* §12-95); Utah (*Utah Code Ann.* §78-12-29); Wyoming (*Wyo. Stat.* §1-3-105[a][v]).

The following states have one-year statutes of limitations for all types of personal injuries: Kentucky (*Ken. Rev. Stat. Ann.* §413.140); Louisiana (*La. Civ. Code Ann.* Art. 3536); Tennessee (*Tenn. Code Ann.* §28-3-104);

2. "[T]here is no guarantee state law will obligingly supply a limitations period to match an abstract analogy that may have little relevance to the forum state's limitations scheme." 85 L.Ed.2d at 273 (O'Conner, J., dissenting).

In *Jones v. Preuit and Mauldin*, 763 F.2d 1250 (11th Cir. 1985), the first Circuit decision applying the rule set forth in *Wilson*, the court was required to choose an appropriate Alabama limitations statute for a §1983 action. Prior to *Wilson*, the applicable Alabama limitation statute in §1983 actions was a one-year "catch-all" statute which included negligence causes of action, but not intentional tort causes of action. *See Jones v. Preuit and Mauldin*, 586 F.Supp. 1563 (N.D. Ala. 1984), *rev'd*, 763 F.2d 1250 (11th Cir. 1985). After *Wilson*, however, the Eleventh Circuit chose to apply a six-year statute dealing with intentional torts over the one-year "catch-all" statute. In making that choice, the Eleventh Circuit recognized that "obviously . . . some §1983 claims will sound in trespass and others in trespass on the case." *Jones v. Preuit and Mauldin*, 763 F.2d 1250, 1255 (11th Cir. 1985). The court in *Jones* defined trespass as basically intentional acts and trespass on the case as basically non-intentional acts. The *Jones* court then turned to the *Wilson* case's reasoning to determine which of the two statutes applied:

> The appropriate characterization of §1983 personal injury claims must be determined by searching the legislative history of the statute and isolating the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators intended first and foremost to address. The Supreme Court in *Wilson* made such a determination in order to conclude that §1983 claims are personal injury claims rather than general statutory claims falling within a catch-all limitations statute. . . .

> . . .The paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were acts of intentional and direct violence on the part of the Ku Klux Klan. 763 F.2d at 1255.

Based on the "historical context" of the enactment of the Reconstruction Civil Rights Acts, the Eleventh Circuit concluded that "on the basis of Congressional intent and [*Wilson v. Garcia*] . . . a §1983 claim should be characterized as a personal injury along the lines of trespass." 763 F.2d at 1256.

In *Mulligan v. Hazard*, No. 84-3555, slip op. (6th Cir. Nov. 26, 1985), the Sixth Circuit Court of Appeals was faced with the choice of applying a one-year statute dealing with certain intentional torts and a two-year statute for "bodily injury". The case involved a §1983 claim quite similar to the instant case. In *Mulligan*, the plaintiff, a university professor, alleged that the Ohio State University Board of Trustees unconstitutionally restricted her tenure rights by amending the university's tenure policy to provide for "campus-specific tenure" in place of the prior practice of "university-wide tenure." The Sixth Circuit held that the one-year Ohio statute governing certain intentional torts was the correct statute to apply to §1983 cases originating in Ohio.[3] While acknowledging that not all intentional torts were listed in the one-year statute, the Court, relying on the historical analysis of *Wilson*, concluded that:

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3. The Sixth Circuit applied a one-year statute of limitations, *Ohio Rev. Code* §2305.11, which was virtually identical to the Mississippi Code section applied by the Fifth Circuit in the instant case, *Miss. Code Ann.* §15-1-35 (Supp. 1985).

> The concern of Congress, thus, was with perpetrators of intentional tortious conduct. While both §§2305.10 and 2305.11 theoretically encompass intentional tort actions, §2305.11, which applies to actions involving assaults, batteries and the like, more specifically encompasses the sorts of actions which concerned congress as it enacted the civil rights statutes. Accordingly, we hold that the one-year limitations period contained in §2305.11 governs Mulligan's actions. *Mulligan v. Hazard*, slip op. at 8.

The Fifth Circuit Court of Appeals in the instant case was faced with the same choice as the Eleventh Circuit had in the *Jones* case and the Sixth Circuit had in the *Mulligan* case. Mississippi has two statutes of limitations which are applied to personal injury actions depending on the kind of tort involved. *Miss. Code Ann.* 15-1-35 (Supp. 1985) [hereinafter referred to as §15-1-35] provides a one-year limit on suits filed alleging certain intentional acts causing personal injury. *Miss. Code Ann.* §15-1-49 (Supp. 1985) [hereinafter referred to as §15-1-49], on the other hand, is a so-called "catch-all" statute which fixes a six-year limit on all suits filed which are not governed by any other specific limitation statute. Suits alleging negligence and strict liability, among others, are governed by this six-year statute.

The mere fact that certain intentional torts causing personal injury do not appear in the list of intentional torts does not mean the Mississippi legislature did not intend §15-1-35 to govern intentional torts causing personal injury. Both the United States District Court for the Northern District of Mississippi and the Mississippi Supreme Court have recognized this. *See Andrews v. G.A.B. Business Services, Inc.*, 443 F.Supp. 510 (N.D. Miss. 1977) (suit alleging

invasion of privacy barred by §15-1-35 although invasion of privacy not explicitly listed as an intentional tort in that code section); *Dennis v. Travelers Ins. Co.*, 234 So.2d 624, 626 (Miss. 1970) ("there can be no escape from the bar of the statute of limitations applicable to intentional torts by the mere refusal to style the cause brought in a recognized statutory category and thereby circumvent prohibition of the statute.").

The Petitioner's argument that §15-1-35 "is inapplicable to suits for personal injuries" (Petition of Petitioner at 17) is merely a semantical argument. *Nelson v. James*, 435 So.2d 1189 (Miss. 1983) dealt with the alleged *negligent* operation of a motor vehicle by the defendant and whether the six-year statute of limitations contained in §15-1-49 could be tolled when the final day of the six years fell on a Sunday. *Ford Motor Company v. Broadway*, 374 So.2d 207 (Miss. 1979) dealt with the applicable statute of limitations in a *products liability case*. *Bell v. Kansas City M & B Co.*, 68 Miss. 19 (1891) simply held that §15-1-35 was not designed to regulate suits against railroad companies for assaults since, at that time, a railroad company was not legally able to commit such an act.

Even if it were true that §15-1-35 applies only to the torts listed in that section, the outcome would be the same. The Fifth Circuit Court of Appeals in the case at bar did not consider the fact that not all intentional torts were explicitly listed in §15-1-35 to be significant in its decision. Rather, that court focused on "the state statute most analogous to §1983" by a consideration of "the dominant purpose of Congress in enacting §1983". *Gates v. Spinks*, 771 F.2d 916, 919 (5th Cir. 1985).

The fact remains that all three Circuit Courts of Appeal which have applied this Court's decision in *Wilson*–the Eleventh in *Jones*, the Fifth in the case at bar and the Sixth in *Mulligan*–applied the intentional tort statute of limitations rather than a residual or negligence-based statute. Each case used *Wilson*'s logic in reaching its decision. While it is true that the Court in *Wilson* did not further define "personal injury" statute of limitations, the district courts and courts of appeal are capable of determining each state's personal injury statute in conformity with the ruling in *Wilson*, and, as here, determining which of the state's personal injury statutes is applicable.

II. THE SELECTION OF MISSISSIPPI'S ONE-YEAR LIMITATION PERIOD FOR ALL §1983 CLAIMS IS NOT INCONSISTENT WITH THE OVERRIDING FEDERAL INTERESTS EMBODIED IN THE CIVIL RIGHTS ACT AND DOES NOT UNDULLY BURDEN THE ASSERTION OF FEDERAL CONSTITUTIONAL RIGHTS.

In support of her argument that a one-year statute of limitations for §1983 cases is inherently improper, Petitioner cites four cases. Two of these, *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978) and *Van Horn v. Lukhard*, 392 F.Supp. 384 (D.C. Va. 1975) are Virginia-based cases in which the Fourth Circuit Court of Appeals and the Virginia District Court, respectfully, refused to apply a one-year statute of limitations enacted by Virginia's legislature specifically for §1983 claims. *Shouse v. Pierce County*, 559 F.2d 1142 (9th Cir. 1977), a third case cited by the Petitioner, is clearly too short a period for filing §1983 claims: 30 days. *Burnett v. Grattan*, 82 L.Ed. 36 (1984) dealt with a six-month statute of limitations and the Supreme Court found that not to be long enough. Aside from the two Virginia cases, however, the Petitioner has cited no authority that one year is not a sufficient time in which to file a §1983 claim.

Three factors suggest that one year is a quite sufficient period within which to file a §1983 claim.

First, the only time limitation statute included in the Reconstruction Civil Rights Acts is 42 U.S.C. §1986 [hereinafter referred to as §1986].[4] The one-year limitation provided for in that section, while not binding in §1983 actions, could certainly be considered persuasive insofar as setting a minimum time limit for §1983 actions, since, logically, the time required to prepare for the filing of a suit under §1986 would seem to be at least as great for that required for filing most §1983 suits. If the Court is trying to determine the minimum time limit which will not constitute a burden on the assertion of federal constitutional rights, it seems reasonable to conclude that the one-year limit of §1986 is what the Congress in 1871 would have required had it chosen to speak to the issue.

Secondly, a brief review of the facts in the case at bar demonstrates that the one-year statute did not work any hardship on the Petitioner in this case. On April 3, 1981, the Petitioner was given notice pursuant to state statute[5]

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4. 42 U.S.C. §1986 provides: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case. . . . But no such action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

5. *Miss. Code Ann.* §37-9-105 (Supp. 1985).

that her principal had not recommended her for reemployment for the 1981-82 school year. In accordance with the Mississippi Employment Procedures Act,[6] the Petitioner requested a hearing, and the School District, through its Board of Trustees, after the hearing, on September 3, 1981, approved, upheld and affirmed the initial administrative recommendation not to reemploy the Petitioner. The Petitioner then appealed the Board's decision to the Forrest County, Mississippi, Chancery Court, perfecting the appeal on September 3, 1981, the very same day the Board of Trustees made its decision. The Chancery Court, on May 28, 1982, reversed the decision of the Board of Trustees, but on December 12, 1984, the Mississippi Supreme Court reversed the Chancery Court decision and reinstated the original September 3, 1981, decision of the School Board. Meanwhile, the Petitioner filed this § 1983 suit on December 1, 1982, after the ruling of the Chancery Court in her favor, but two years prior to the decision of the Mississippi Supreme Court reinstating the original School Board decision. The Petitioner had no difficulty making a request to the School Board for an administrative hearing within five days of her receipt of the notice of non-reemployment. Once the Chancery Court reversed the School Board and ruled in her favor, she had no difficulty filing the present action. But the Petitioner was not required to exhaust her administrative remedies before filing this suit.[7] She just waited

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6. *Miss. Code Ann.* §37-9-109 (Supp. 1985).

7. *See, e.g., McNeese v. Board of Education*, 373 U.S. 668, 10 L.Ed.2d 622, 83 S.Ct. 1433 (1963); *Damico v. California*, 389 U.S. 416, 19 L.Ed.2d 647, 88 S.Ct. 526 (1967); *Rainey v. Jackson State College*, 435 F.2d 1031 (5th Cir. 1970).

until she had a favorable decision in the administrative line of review before filing suit. In so doing, under the application of *Wilson* by the Fifth Circuit, she simply waited too late.

Finally, the Sixth Circuit in *Mulligan v. Hazard*, No. 84-3555, slip. op. (6th Cir. Nov. 26, 1985) had no hesitancy applying a one-year Ohio statute of limitations to that plaintiff's § 1983 claim.

What, then, is the minimum reasonable time limitation for filing § 1983 suits? Based on the analogous reasoning of § 1986, the Sixth Circuit's decision in *Mulligan*, and the facts of this case–which is certainly not atypical of employment discrimination-based § 1983 cases–one year is reasonable.

III. THE COURT OF APPEALS DID NOT ERR IN RETROACTIVELY APPLYING *WILSON V. GARCIA* TO BAR THE PETITIONER'S CLAIM, BUT EVEN IF *WILSON V. GARCIA* WERE NOT APPLIED RETROACTIVELY THE PETITIONER'S CLAIM WOULD BE BARRED.

There is no question that *Wilson v. Garcia* changed the law in Mississippi with regard to the applicable statute of limitations in § 1983 actions, but the Respondents differ significantly with the Petitioner as to the effect of a prospective versus retroactive application of *Wilson* in the instant case.

Prior to *Wilson*, § 1983 suits originating in Mississippi in which a plaintiff alleged a discriminatory termination from employment, as is the case here, were governed by the one-year limitation of *Miss. Code Ann.* § 15-1-29 (Supp. 1985), and it was on this basis that the District Court originally granted summary judgment in the Respondent's favor.

See Petitioner's Appendix at A-2. The Fifth Circuit Court of Appeals recognized this in its opinion in the instant case, calling this line of cases "binding circuit authority",[8] strongly implying that it would have affirmed the district court on the same basis as the district court had originally granted summary judgment but for *Wilson v. Garcia*.

The line of cases advanced by the Petitioner as being the law in Mississippi in §1983 cases where a statute of limitations question is involved was held inapplicable by the Fifth Circuit to cases involving alleged discriminatory termination from employment.[9]

Even if, therefore, *Wilson* should be applied prospectively, the result would be the same for the reasons stated in the district court's original opinion.

The fifth Circuit Court of Appeals did not err, however, in applying the *Wilson* decision retroactively since, as the Sixth Circuit Court of Appeals in *Mulligan* noted, the *Wilson* decision "implicitly mandates that its decision be applied retroactively," by retroactively applying the New Mexico statute governing personal injuries. *Mulligan v. Hazard*, slip op. at 7.

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8. 771 F.2d at 917.

9. *Morrell v. City of Picayune*, 690 F.2d 469 (5th Cir. 1981), is inapplicable to cases involving wrongful termination from employment since *Morrell* dealt with "physical abuse and injury." *Breland v. Board of Education of Perry County, Mississippi*, 729 F.2d 360 (5th Cir. 1984).

Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976), is inapplicable to the case at bar for two reasons. Like *Morrell*, it was a "police brutality" case. Additionally, the plaintiff in *Shaw* sued both the police officer and his bonding company, making the suit, under Mississippi law at that time, a suit for breach of contract rather than a tort.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MORAN M. POPE, III
Counsel of Record
MORAN M. POPE, JR.
POPE & POPE
Post Office Box 1463
Hattiesburg, Mississippi 39401
(601) 544-2491

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Moran M. Pope, III, Counsel for Respondents, do hereby certify that I have served a copy of the foregoing Response to Petition for Writ of Certiorari, by mailing a copy of the same by United States Mail, postage fully prepaid, to Hon. Jack D. Novik and Hon. Burt Neuborne, American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York, 10036, Counsel for Petitioner.

This, the 17th day of February, A.D., 1986.

Moran M. Pope III

Moran M. Pope, III